ORIGINAL

No. 98-1441

In the

Supreme Court of the United States

October Term, 1998

ERNEST C. ROE, WARDEN,
Petitioner,

v.

LUCIO FLORES-ORTEGA
Respondent.

On Petition for Writ of Certiorari
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this court deny certiorari because the question of whether failure of counsel to file a notice of appeal without consent is long-established precedent, not barred by Teague v. Lane, 489 U.S. 288 (1989)?

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent, Lucio Flores-Ortega, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at Ortega v. Roe, 160 F.3d 534 (9th Cir. 1998) and attached to the Petition for Writ of Certiorari.

The issue, as framed by the Magistrate Judge, was whether United States v. Stearns, 68 F.3d 328 (9th Cir. 1995), required that the government show that Ortega did not consent to the non-filing of the appeal. The Magistrate Judge explained to the prosecutor that, under Stearns, "the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal, rather than on whether counsel ignored an explicit request to file...He need only show that he did not consent to the failure to file." The evidence, the Magistrate Judge stated, is "quite clear that there was no consent to a failure to file."

On October 13, 1993, Lucio Flores-Ortega (Ortega) entered a plea of guilty to the charge of second degree murder in the Superior Court of California, County of Fresno, before the Honorable Dwayne Keyes. He was represented by the public defender. The plea was taken pursuant to People v. West, 3 Cal.3d 595 (1970) permitting him to deny the crime to the court under California law while admitting that there was sufficient evidence to convict him.

Ortega speaks no English. After a difficult plea, the public defender visited him with an interpreter before the sentencing. At some point, the lawyer noted, "bring appeal papers" on the presentence report. Ortega was sentenced on November 10, 1993 to a 15 year to life sentence.

In spite of the fact that the public defender noted in her file that she should "bring appeal papers", she did not file a Notice of Appeal. Within approximately four months, when he made

an inquiry, Ortega found out that his attorney had not filed an appeal.

On March 24, 1994, Ortega submitted a Notice of Appeal and Request for Certificate of Probable Cause. On April 8, 1994, the Fresno County Clerk of the Court refused to file the Notice, and referred him to the Court of Appeal. On August 12, 1994, the Fifth District Court of Appeal also declined to file his appeal. The basis for the denial, in spite of judicial policy protecting the right of appeal, was there were no grounds for appeal from this guilty plea. Essentially, the court ruled on the merits before permitting the filing of the Notice of Appeal.

A petition for writ of habeas corpus was filed with the California courts on June 3, 1994, and denied by the California Supreme Court on January 18, 1995. On July 27, 1995, Ortega timely filed a federal petition for habeas corpus. Counsel was appointed, and an evidentiary hearing was held before the Magistrate Judge.

Ortega's state lawyer testified at the evidentiary hearing that she reviewed the sentencing report with Ortega the day before sentencing. She still had her notes on the sentencing report, which included the notation "bring appeal papers." She testified that the notation, "bring appeal papers" meant that she was "giving herself a reminder to take appeal papers to court with her at sentencing." Counsel testified that she must not have done so, because the appeal was not filed.

Ortega's state attorney could not remember whether she and Ortega had discussed the appeal, though she conceded that she had probably written the notes to "bring appeal papers" on the day before court, and that she then forgot to bring said papers.

Ortega's attorney testified that she probably would have recommended against the appeal, but believed that ordinarily she probably would have filed an appeal if the client told her to do so. Here, the appeal was discussed, the client believed she was going to file an appeal even though

she advised against it, and the attorney failed to do so.

The Magistrate Judge held, and the district court affirmed, that Stearns was a new rule under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and that it should not apply to this case. The Ninth Circuit reversed and remanded, stating that reviewing the legal landscape at the time the conviction became final, Ortega did not rely on a new rule and the petition was not barred by Teague. The district court was instructed to issue a conditional writ releasing Ortega from custody unless the state trial court vacates and re-enters petitioner's judgment of conviction and allows a fresh appeal.

Petitioner argues that this court must state the exact rule or the precedent of the United States Circuit Court is inapplicable to the states. This question, however, does not arise in this case, because this court has already ruled upon this issue.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS RULED ON THIS ISSUE MANY TIMES OVER A THIRTY-YEAR PERIOD; THE HOLDING THAT IT IS INEFFECTIVE ASSISTANCE OF COUNSEL IF COUNSEL FAILS TO FILE A NOTICE OF APPEAL WITHOUT THE DEFENDANT'S CONSENT IS NOT A NEW RULE

A. There is no "explicit and substantial break with prior precedent" involved in this case.

Teague v. Lane, requires that when this court makes a ruling which is an "explicit and substantial break with prior precedent" it should only be applied prospectively. Teague, 489 U.S. at 294, 109 S.Ct. at 1066, 103 L.Ed.2d 334. The Teague court adopted the rule previously espoused by Justice Harlan which stated that the integrity of judicial review required application of a new rule to "all similar cases on direct review." Teague, 489 U.S. at 302, 109 S.Ct. at 1071,

103 L.Ed.2d 334.

Direct review and collateral review require different standards, so Teague requires that the court review the "legal landscape" at the time of the conviction in the state. The district court did that, and found that Stearns, 68 F.3d 328 (9th Cir. 1995) was a new rule which did not apply. The Ninth Circuit correctly held that Teague requires a three-step analysis:

> First, the court must determine the date on which the petitioner's conviction became final...Second, it must 'survey the legal landscape as it then existed,'... to 'determine whether a state court considering the petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the Constitution'...Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity. (Appendix A4, citations omitted).

The Ninth Circuit ruled that Stearns was not in the legal landscape at the time, but that, "Stearns tracks our opinion in Lozada v. Deeds, 964 F.2d 956 (9th Cir. 1992), which predates petitioner's conviction." The Ninth Circuit ruled that Stearns merely clarified that the rule in Lozada which was applicable to collateral review, also applied to direct review. (Appendix A5)

The Supreme Court has ruled on this issue. The defendant in Lozada v. Deeds, 498 U.S. 430, 431, 111 S.Ct. 860, 861, 112 L.Ed.2d 956 (1991) argued in a petition pursuant to 28 U.S.C. § 2254 that his attorney failed to inform him of his right to appeal and his right to counsel. Further, the attorney failed to file a notice of appeal, or to ensure appointment of counsel. Lozada, 498 U.S. at 431, 111 S.Ct. at 861, 112 L.Ed.2d 956 (1991). Lozada was remanded to the Ninth Circuit. The district court had dismissed the petition on the ground that no prejudice was shown, and there was no demonstration that the appeal would succeed -- the same grounds espoused by the state appellate court here. Lozada v. Deeds, 964 F.2d 956, 957 (9th Cir. 1992).

Petitioner argues that this court should state unequivocally that state courts do not have to follow circuit authority on Constitutional issues, that they need only follow Supreme Court authority.

B. This Case is Based on Thirty Years of Precedent

Justice Brennan discussed the right to petition for a writ of habeas corpus when there is not a knowing and intelligent waiver of the right to appeal in Fay v. Noia, 372 U.S. 391, 398, 83 S.Ct. 822, 827 (1969). The defendant, Noia, did not appeal, though the confessions of his codefendants were found to be coerced. The Supreme Court agreed that violation of his constitutional rights should be corrected by Writ of Habeas Corpus in spite of his failure to appeal because there was not an intelligent and understanding waiver of his right to appeal.

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of the state procedures, then it is open to the federal court on habeas to deny all relief. . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Fay v. Noia, 372 U.S. at 440, 83 S.Ct. at 849.

In a federal case on direct appeal, the Supreme Court indicated, in 1969, that an appeal from a District Court's judgment of conviction in a criminal case is a matter of right. Rodriguez v. United States, 395 U.S. 327, 329, 89 S.Ct. 1715, 1716 (1969). A criminal defendant is entitled to effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985).

"We hold that prejudice is presumed under Strickland [Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." Lozada v. Deeds, 964 F.2d 956, 958-959

(9th Cir. 1992). This was precedent. It was in existence at the time Ortega was convicted. This precedent came in a direct line, on remand from this court. Lozada v. Deeds, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991). This court held, in a *per curiam* opinion that it was a violation of the Sixth Amendment when the attorney failed to file a notice of appeal and the District Court denied a Certificate of Probable Cause because there was no prejudice. Lozada, 498 U.S. at 432, 111 S.Ct. at 861, 112 L.Ed.2d, 956. An interesting point is made in Lozada, wherein this court stated,

> Since Strickland, at least two Courts of Appeals have presumed prejudice in this situation. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Circuit 1990); Estes v. United States, 883 F.2d 645, 649 (8th Circuit 1989); see also Rodriguez v. United States, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d 340 (1969). The order of the Court of Appeals did not cite or analyze this line of authority as reflected in Estes, which had been decided before the Ninth Circuit issued its ruling.

Lozada v. Deeds, 498 U.S. at 432, 111 S.Ct. at 862, 112 L.Ed.2d 956 (1991).

This statement by this court does acknowledge, contrary to the petitioner Attorney General's theory, that the Ninth Circuit can review and analyze authority, and make decisions based on federal law and rulings. This court should not have to reiterate the same rule each decade in order to have the State of California follow the rule.

The Supreme Court, in Lozada v. Deeds, cited Abels v. Kaiser, 913 F.2d 821, 822 (10th Cir. 1990). Lozada, 498 U.S. at 432, 111 S.Ct. at 862. Abels v. Kaiser held that there was no requirement of showing prejudice citing Rodriguez v. United States, 395 U.S. 327, 330, 89 S.Ct. 1715, 23 L.Ed. 340 (1969) for the proposition that:

> Those whose right to appeal has been frustrated should be treated exactly like any other appellant; he should not be given an additional hurdle to clear just because the rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief

because of his failure to specify the points he would raise were his right to appeal reinstated.

There is no question in this case that the petitioner did not consent to the failure to file a notice of appeal. At the time of the conviction, 1993, Lozada v. Deeds was the law.[1/] Failure to file a notice of appeal is an error so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment, and the deficient performance prejudiced the defense. United States v. Stearns, 68 F.3d 328, 329 (9th Cir. 1995)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

Abels also cited Riser v. Craven, 501 F.2d 381 (9th Cir. 1974). Apparently, in 1974, in this same district, the State of California was making the same argument it is making again twenty-five years later. Riser stated a prima facie case for relief under Rodriguez, Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969) and Sanders v. Craven, 488 F.2d 478 (9th cir. 1973), except that there was an intervening 9th Circuit opinion wherein the circuit court stated, as the Attorney General believes today, that Rodriguez "is not necessarily applicable on federal habeas corpus review of state convictions." Riser, 501 F.2d at 382. In order to clear up any discrepancy, the court specifically and expressly overruled the case making that statement in Buster v. Hocker, 428 F.2d 820 (9th Cir. 1970). Riser, 501 F.2d at 382. The final ruling in Riser was that, "If the district court decides that Riser was deprived of the effect assistance of counsel, then as in Sanders, 'it should give the California Courts the opportunity to allow the appeal and pass on the substance' of his other claims of error. (Sanders v. Craven, supra, 488 F.2d at 480)" Riser, 501 F.2d at 382.

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1. In Footnote 5, the Attorney General stated that 9th Circuit Lozada was not based on any Supreme Court precedent.

In the sixties this court said defendants in the state or federal system needed to be informed of their right to appeal and their right to counsel on appeal; in the seventies, the 9th Circuit clarified that right; in the eighties, this court made clear the standards of ineffective assistance of counsel; in the nineties it was reiterated that deprivation of appellate rights denied effective assistance of counsel. This is no "new rule". It is not a new rule as applied. The Supreme Court should not have to grant certiorari every time a potentially new set of facts arises.

Historically, from Fay v. Noia to the present, the cases are a seamless line requiring lawyers to advise their clients of their appellate rights, and to preserve those rights if the client does not consent to waiver. In this case, counsel apparently advised Ortega of his rights, and wrote, "bring appeal papers" on his pre-sentence report. She did not, however, preserve those rights. The Magistrate Judge held that Ortega did not consent to the failure to file the notice of appeal. This is not a new rule.

The Ninth Circuit on remand followed the instructions of the United States Supreme Court, holding that prejudice was presumed because counsel on appeal was denied altogether under Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Lozada was remanded to the district court for a determination of whether the waiver of appeal was without the consent of the defendant. In our case, the Magistrate Judge has already made that finding.

Here, the Ninth Circuit Court followed United States v. Stearns, 68 F.3d 328 (9th Cir. 1995), which followed the Ninth Circuit Lozada, which followed the Supreme Court Lozada, which followed Strickland and Rodriguez. The rather interesting, yet backwards argument that the state need not follow circuit precedent ignores the fact that the Ninth Circuit cannot overrule

the Supreme Court. A new rule, by any definition, is made by the Supreme Court. If the Ninth Circuit incorrectly interprets the case law, then that may be grounds for review, but it is not creating a new rule barred by Teague.

C. There is no Teague Bar in This Case, There is no New Rule

Teague discusses federal courts making new rules; but says they are not prospectively barred unless the court announces a new rule which is not based on precedent. The state can argue that a rule is a misstatement of the law, or not, but under its own argument, it is not a new rule barred by Teague unless the Supreme Court announces it. Here, the California court did not permit the late filing of a Notice of Appeal when Ortega determined that the Notice had not been filed. In spite of state rules of court to the contrary, and a presumption in favor of filing, the state appellate court also denied the right to file a notice of appeal.

California courts did not consider the Constitutional Sixth Amendment argument at hand, which is that Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) requires filing a notice of appeal unless the client consents to the non-filing. United States v. Stearns, 68 F.3d 328 (9th Cir. 1995). It is not a complicated rule, or a difficult rule, and it was based on precedent in existence at the time, including Supreme Court precedent from 1963.

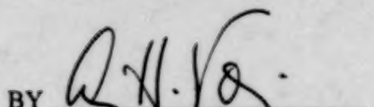
Here, Ortega was told that he had the right to appeal, and believed his attorney was filing a notice of appeal. She did not. She should have. There was no error in reversal.

CONCLUSION

The Ninth circuit correctly upheld precedent requiring counsel to inform defendants of appeal rights and to preserve those rights if they are not waived. Petition for Writ of Certiorari should be denied.

Dated: March 31, 1999

QUIN DENVIR
Federal Defender

BY 

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN,

Petitioner,

v.

LUCIO FLORES ORTEGA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On March 31, 1999, he/she personally served a copy of the attached:

RESPONDENT'S BRIEF IN OPPOSITION

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Fresno, California, as follows:

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Dated: March 31, 1999

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March 31, 1999

Clerk of the Court
U.S. Supreme Court
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Washington, D.C. 20543

Re: *Ernest C. Roe, Warden, v. Lucio Flores-Ortega*
Case No. 98-1441

Dear Clerk of the Court:

Enclosed please find an original and 13 copies of Respondent's Brief in Opposition, along with Respondent's Motion to File Opposition Brief in Forma Pauperis, in the above entitled case. Please return a conformed copy in the self-addressed stamped envelope that is provided.

I am available to answer any questions in this regard. Thank you for your attention to this request.

Sincerely,

ANN H. VORIS
Assistant Federal Defender

AHV:dcr

cc: Paul Edward O'Connor,
Deputy Attorney General